Supreme Court, U.S.
FILED
99 378 AUG 31 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; MICHAEL D. RIVES,

Petitioners,

v.

RELIANCE NATIONAL INSURANCE COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWARD A. WILLIAMSON
Counsel of Record
THE WILLIAMSON LAW FIRM
ATTORNEYS AT LAW
Attorneys for Petitioners
509A Church Avenue
Philadelphia, Mississippi 39350
(601) 656-5634

154759

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

5788

QUESTIONS PRESENTED

1. May a federal court of appeals, sitting in diversity, create a divergent system of law by choosing a rule of decision from other jurisdictions and imposing it upon diversity litigants forced into the federal system or should the prime rule be that "cases dependent" on state law not be "decided differently according to whether they (litigants) are before federal or state courts," *King v. Travelers*, 333 U.S. 153, 157, 158, 68 S. Ct. 488, 491 (1948)?

(a) May a federal court of appeals, sitting in diversity in a *de novo* review to determine insurance coverage, construe the meaning of "named insured" in a clause which excludes coverage of damages arising out of the use of an aircraft owned by the "named insured" to mean **any** person **insured** so as to exclude coverage without consulting state law restricting the meaning and scope of "named insured" in insurance policies?

(b) May a court of appeals, sitting in diversity and predicting state law on a determinative issue, in the absence of a state supreme court decision on the issue, legislatively impose upon diversity litigants its perception of the "majority view" without having either: (i) given proper regard to an intermediate court of appeals opinion directly on point though that opinion may not be cited as precedent in state courts; or (ii) considered other relevant rulings by the state supreme court; or (iii) certified the question to the supreme court of the state when the supreme court has shown an interest in considering the issue?

(c) Should this Court resolve the split between the circuit courts of appeal on the deference to be given decisions

of intermediate state courts of appeal by federal courts sitting in diversity in the absence of a state supreme court decision — the "must follow" rule versus the "proper regard" rule versus the "it is proper to look" rule?

2. May a federal court of appeals, sitting in diversity to determine the effect of a "named insured" owned aircraft exclusion on an insured (but not a **named** insured) judgment debtor who crashed and caused the death of one judgment creditor and paralysis of another fail to apply the seminal holding in a recent decision by another panel of its own circuit predicting applicable state law on the effect of a "separation of insureds" clause on exclusions applicable to named insureds versus non-named insureds?

3. May a court of appeals, sitting in diversity in a *de novo* review, make a conclusion on a determinative issue without providing any rationale or basis for its conclusion; are diversity litigants in federal courts of appeal entitled to any minimal due process rights such that this court's supervisory powers and obligations should be brought to bear?

LIST OF PARTIES

A. PETITIONERS:

1. Lelia Branning Tucker, mother of April Tenille Branning;

2. Lester Branning, father of April Tenille Branning;

3. Scott Branning, brother of April Tenille Branning; and

4. Michael B. Rives.

B. RESPONDENT:

1. Reliance National Insurance Company

C. OTHER PARTIES NOT INVOLVED IN THIS LITIGATION:

1. Tomlinson Avionics of Mississippi, Inc., judgment debtor in Civil Action No. 95-10 and Civil Action No. 96-4;

2. Tomlinson Avionics, Inc., judgment debtor in Civil Action No. 95-10 and Civil Action No. 96-4;

3. The Estate of Michael D. Tomlinson, judgment debtor in Civil Action No. 95-10 and Civil Action No. 96-4; and

4. Hinds Community College District, defendant in Civil Action No. 95-10 and Civil Action No. 96-4, dismissed on summary judgment in the Circuit Court of Hinds County, Mississippi, affirmed on appeal to the Mississippi Supreme Court.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. A Federal Court Sitting In Diversity May Not Simply Impose Upon Diversity Litigants Its Perception Of The Majority View On A Determinative Point Of Law In The Absence Of A Ruling By The Highest Court In The State Without Giving Proper Regard To A State Court Of Appeals Opinion Directly On Point, Or Without Having Exhaustively Examined All Datum Of The Content Of State Law On The Issue Or Without Certifying The Question To The Highest Court Of The State.	5

Contents

		Page
	A. The Failure To Give Proper Regard. . .	6
	B. Failure To Certify The Question To The State Supreme Court.	10
	C. This Court Should Resolve The Split Between The Circuits On The Deference To Be Given Intermediate Court Of Appeals' Decisions.	12
II.	By Ignoring An Intervening Fifth Circuit Decision Predicting State Law On The Reach Of Exclusions In The Face Of "Separations Of Insureds" Clauses, The Fifth Circuit Opinion, Again, Ignored State Law On A Determinative Issue In Its Opinion.	14
III.	An Opinion Which Simply Makes An Unreasoned Conclusion On A Determinative Issue Falls Below The Minimum Standard Due A Civil Litigant, Even A Diversity Litigant, In Federal Court Such That This Court's Supervisory Powers Are Called On, Not Only To Correct An Obvious Wrong And See To It That Federal Courts Provide Minimal Due Process In Its Appellate Procedures, But Also To Make Uniform Those Standards Due Diversity Litigants Throughout The Federal System.	16
Conclusion		18

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Casualty v. Barker, 451 So. 2d 731 (1984) . 9

Assicurazioni v. Neal, 160 F.3d 997 (4th Cir. 1998) 12, 14

Brown v. Hartford Insurance Company, 606 So. 2d 122 (Miss. 1997) 4, 18

Caldwell v. Hartford Accident and Indemnity Company, 248 Miss. 767, 160 So. 2d 209 (Miss. 1964) 4, 17

Centennial Insurance Company v. Ryder Truck Rental, Inc., 149 F.3d 378 (5th Cir. 1998) 14, 15

Doyle v. Volkswagenwerk, 81 F.3d 139 (11th Cir. 1996) 13

Federal Deposit Ins. Corp. v. Abraham, 137 F.3d 264 (5th Cir. 1998) 13, 15

Fidelity Union Trust Company v. Field, 311 U.S. 169, 61 S. Ct. 176 (1940) 9, 10

First Investors Corporation v. Liberty Mutual Insurance, 152 F.3d 162 (2nd Cir. 1998) 13

Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 518 (1972) 9

Cited Authorities

	Page
Harris v. McGee, 537 So. 2d 646 (1990)	9
Harris v. State, 704 So. 2d 1286 (Miss. 1997)	10
King v. United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488 (1948)	i, 8, 10, 18, 19
Lexington Insurance Company v. Rugg and Knopp, Inc., 165 F.3d 1087 (7th Cir. 1999)	11, 12, 14
Love v. McDonough, 758 F. Supp. 397 (S.D. Miss. 1991), *aff'd without opinion*, 947 F.2d 1486 (5th Cir. 1991)	7, 8
Matheny v. Glenn Falls Insurance Company, 152 F.3d 348 (5th Cir. 1998)	13
Nationwide Mutual Insurance Company v. Garriga, 636 So. 2d 658 (Miss. 1994)	4, 17
Nelson v. Irvine, 143 F.3d 119 (9th Cir. 1998)	12
Providence Washington Insurance Company v. Carol English, et al., Number 93-CA-00921 COA	3, 5, 7, 8, 9, 11, 18
Rompy v. State Farm Mut. Auto Insurance Co., 278 So. 2d 428 (1973)	9
Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217 (1991)	8, 9

Cited Authorities

Page

Sellers v. Allstate Insurance Company, 82 F.3d 350 (10th Cir. 1996) 12

Shanks v. Allied Signal, Ins., 169 F.3d 988 (5th Cir. 1999) 13

State Farm Mutual Auto Insurance v. Scitz, 394 So. 2d 1371 (Miss. 1981) 4, 17

Stevens v. United States Fidelity and Guaranty Co., 345 So. 2d 1041 (1977) 9

2-J Corporation v. Tice Construction Company, 126 F.3d 539 (3rd Cir. 1997) 13

Veale v. Citibank, 85 F.3d 577 (11th Cir. 1996) ... 12

West v. American Telephone and Telegraph Company, 311 U.S. 223, 61 S. Ct. 179 (1940) 6, 7, 19

Ziebart International Corp. v. CNA Insurance Companies, 78 F.3d 245 (6th Cir. 1997) 13

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C.A. § 1652 11

Cited Authorities

Page

Rules:

Mississippi Supreme Court Rule 20 11

Mississippi Supreme Court Rule 20(A) 11

United States Supreme Court Rule 10(a) 18

Other Authorities:

Delores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992) 11

Southwick, *The Mississippi Court of Appeals: History, Procedures, and First Year's Jurisprudence* 65 Miss. L.J. 593, Spring 1996 10

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated And Filed April 20, 1999 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of Mississippi, Jackson Division Dated And Filed June 22, 1998 ..... 12a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petitions For Rehearing Dated And Filed June 2, 1999 ..... 19a

Appendix D — Excerpts From Opinion Of The Court Of Appeals Of The State Of Mississippi In *Providence Washington Insurance Company v. Carol English, As Administratrix Of The Estate Of John Wesley Webb, et al.* Dated And Decided October 3, 1995 ..... 21a

Appendix E — Mandate Of The Supreme Court Of Mississippi In *Providence Washington Insurance Company v. Carol English, As Administratrix Of The Estate Of John Wesley Webb, et al.* Dated September 26, 1996 ..... 24a

Appendix F — Airport Liability Insurance Policy For Hinds Community College/John Bell Williams Airport Dated March 7, 1994 ..... 26a

Appendix G — Excerpts From Comprehensive General Liability Insurance — Coverage Part .. 28a

The Petitioners, Heirs and Wrongful Death Beneficiaries of April Tenille Branning, and Michael Rives, having received an unfavorable decision by the United States Court of Appeals for the Fifth Circuit, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for t e Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Reliance Nat. Ins. Co. v. Estate of Tomlinson*, 171 F.3d 1033 (5th Cir. 1999) (App. A). The United States Court of Appeals for the Fifth Circuit filed their order denying petitioners' petition for rehearing on June 2, 1999 (App. C). The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, in *Reliance National Insurance Company v. Estate of Michael D. Tomlinson, Deceased, et al.*, Civ. A. No. 3:97-CV-663BN, which was entered on June 22, 1998, is not published, but can be found at App. B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision affirming the judgment of the United States District Court for the Southern District of Mississippi, Jackson Division on April 20, 1999 (App. A). The court of appeals denied a timely petition for rehearing on June 2, 1999 (App. C).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of an aircraft crash which resulted in the death of April Branning and permanent paralysis to Michael Rives. Ultimately, final judgments in the amounts of $2,471,000 and $2,750,000 were granted to April's heirs and Michael, respectively, against the Estate of Michael Tomlinson and the two (2) Tomlinson corporations. The aircraft was owned by Tomlinson Avionics, Inc., one of the defendants. Michael Tomlinson was the airport manager for Hinds Community College, but not an employee. *Heirs and Wrongful Death Beneficiaries of Branning ex rel. Tucker v. Hinds Community College Dist.*, Miss. (1999); 1999 WL 191846 (Miss.).

The Tomlinsons were insured under a rider to Hinds' general liability policy. The rider was called *Special Airport Provisions* and extended coverage to "[a]ny airport manager of the **named insured**. . . ." (emphasis in original). Clause 4(b) of that one-page rider excluded "[t]hat **portion** of any loss arising out of the **ownership or use of aircraft** . . . with respect to which the **insured** has other valid and collectible insurance, whether primary or excess."[1] Pretty straight forward excess coverage — or so the plaintiffs thought.

The petitioners filed garnishment proceedings in state court. Reliance National Insurance Company, respondent to this petition, knew that even if it were able to convince Mississippi trial and appellate courts that "named insured" meant "any insured," notwithstanding Mississippi law to the contrary, and that 4(b) was not the applicable exclusion **and** did not create an ambiguity as to exclusion (therefore,

---

1. *See Special Airport Provisions* attached at App. F.

coverage under Mississippi law), it would still face the prospect of being before the Mississippi Court of Appeals, which in October 1995 had decided *Providence Washington Insurance Company v. Carol English, et al.*, Number 93-CA-00921 COA[2] directly on point and squarely against Reliance's position.

Reliance removed the garnishment proceedings to United States district court to have the federal court system decide whether, under Mississippi law, there was coverage. Though the matter was set for hearing, the district court notified petitioners by phone just before the hearing that it had decided against them; an opinion was to follow. The district court's opinion was that there was no coverage and gave judgment accordingly. The opinion never mentioned 4(b); the opinion is attached as App. B.

The petitioners appealed. The fifth circuit court of appeals did not tarry long with 4(b) either, concluding without offering any rationale that the partial exclusion of 4(b) relating to aircraft owned by the airport manager, and a total exclusion found in the body of the policy (referred to by Clause 3[3] of the rider) were consistent.[4]

---

2. Excerpts from the first, ninth and tenth pages of Providence are attached as App. D, and the subsequent dismissal as offered to the fifth circuit is attached as App. E.

3. Clause 3 provided, "3. The exclusion in the policy with respect to aircraft applies only to aircraft owned by or rented or loaned to the **insured** or **in flight** by or for the account of the **insured**." *See* App. F.

4. A copy of the fifth circuit court opinion is attached as App. A.

The opinion simply does not mention a Mississippi Court of Appeals opinion directly on point and squarely opposite to the opinion's "*Erie* guess"; fails to comment on petitioner's suggestion that the state law question be certified to the Mississippi Supreme Court; fails to provide any basis for its conclusion regarding Clause 4(b) being consistent with total exclusion;[5] and fails to discuss the "interpretative" holding in an intervening decision by another panel of its own circuit predicting Mississippi law on the "interpretative issue," that is, the reach of exclusions when a policy has a "separation of insureds" clause.

---

5. Under Mississippi law, if the reach of an exclusion is not clear, or if, in isolation or when compared to another exclusion, an ambiguity appears, then the exclusion is not valid. Also, if there is any reasonable interpretation of a policy so as to provide coverage or to avoid an exclusion, then, under Mississippi law, there is coverage even if there is a competing reasonable interpretation which would deny coverage, *Caldwell v. Hartford*, 248 Miss. 767, 160 So. 2d 209, 231 (Miss. 1964); *State Farm Mutual Auto Insurance v. Scitz*, 394 So. 2d 1371, 1372 (Miss. 1981); *Nationwide Mutual Insurance Company v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994); *Brown v. Hartford Insurance Company*, 606 So. 2d 122, 126 (Miss. 1997). The exclusion which the fifth circuit opinion holds that 4(b) is consistent with provides, "This insurance does not apply: . . . (b) to **bodily injury** or **property damage** arising out of the ownership . . . of . . . any . . . **aircraft** owned or operated by . . . the **named insured**. . . .", *see* Page One of the Comprehensive General Liability Insurance — Coverage Part attached as App. G.

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL COURT SITTING IN DIVERSITY MAY NOT SIMPLY IMPOSE UPON DIVERSITY LITIGANTS ITS PERCEPTION OF THE MAJORITY VIEW ON A DETERMINATIVE POINT OF LAW IN THE ABSENCE OF A RULING BY THE HIGHEST COURT IN THE STATE WITHOUT GIVING PROPER REGARD TO A STATE COURT OF APPEALS OPINION DIRECTLY ON POINT, OR WITHOUT HAVING EXHAUSTIVELY EXAMINED ALL DATUM OF THE CONTENT OF STATE LAW ON THE ISSUE OR WITHOUT CERTIFYING THE QUESTION TO THE HIGHEST COURT OF THE STATE.

The fifth circuit's decision predicting Mississippi law failed to give "proper regard" to the prerogatives of the state of Mississippi through its courts to develop its own body of law. Rather it imposed upon diversity litigants its perception of the majority view or better rule without a full analysis of all "datum" available from Mississippi judicial sources, totally ignoring a Mississippi Court of Appeals opinion directly on point and by failing to certify the question to the Mississippi Supreme Court in light of the Mississippi Supreme Court's obvious inclination to decide the issue as shown by its grant of certiorari in *Providence.* It also failed to consider Mississippi law on the reach of the term "named insured" in insurance policies.

A. The Failure To Give Proper Regard.

In *West v. American Telephone and Telegraph Company*, 311 U.S. 223, 61 S. Ct. 179 (1940), bench and bar was taught that a federal court sitting in diversity was not free to choose rules of decision for state courts:

> [t]he obvious purpose of §34 of the *Judiciary Act* is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in cases of diversity of citizenship. That object would be thwarted if federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken . .

Id. U.S. at 236, S. Ct. at 183. The Court in *West* went on to hold:

> There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them . . . it is the duty of the former (federal courts sitting in diversity) in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the view point of 'general law' and however much the state rule may have departed from prior decisions of federal courts . . . [a state court of appeals decision] is a datum for ascertaining state law which is not to be disregarded. . . .

Id. at U.S. 236-238. The federal court sitting in diversity must follow the pronouncement of law of inferior state courts regardless of whether another court of appeals in the state may later arrive at a contrary decision, *id.* at U.S. 236-238, S. Ct. 183, 184. Apparently, the state court decision in *West* was an unpublished county court decision because the opinion refers to a filing of the lower appellate court opinion in the record before the court rather than a formal citation, *id.* at U.S. 233, S. Ct. 181.

The Mississippi Court of Appeals rejected the so-called "majority rule" first **imposed on Mississippi litigants in diversity cases in *Love v. McDonough*, 758 F. Supp. 397 (S.D. Miss. 1991), *aff'd without opinion*, 947 F.2d 1486 (5th Cir. 1991)**[6] and followed by the fifth circuit in the case *sub judice*. *Providence* held that, when other acts of negligence which do not involve directly and precede the use of the owned instrument are alleged, such as negligent entrustment and negligent supervision, the mere fact that an excluded instrumentality was used did not result in non-coverage.[7]

---

6. Coincidentally, the author of *Love* was the same district court judge in the case *sub judice*. However, the insurance policy in *Love* and each of the cases in the so-called majority clearly excluded automobiles (instrumentalities: automobiles, aircraft, etc.) owned by "**any** insured," which is not the case here.

7. In addition to alleging negligent entrustment and negligent supervision, the plaintiffs had alleged negligence in appointing an immature and irresponsible person as the official in charge of the airport operations, negligent failure to enforce Hinds and FAA safety rules as required by the airport manager contract, and negligent failure to provide safety policies prohibiting drinking and flying so that all employees, including Michael Tomlinson, would be constantly aware of them, and the failure to post warning signs and notices regarding safety.

Of course, it is axiomatic that there can be no liability without a subsequent negligent use; in the absence of such, there would be no injury and certainly no causal connection. However, the use of the "owned" vehicle was only the factual and not the legal cause; the vehicle or the instrumentality involved only the proximate cause element, factually, which connected with the breach of duty to make out the cause of action. Therefore, the exclusion did not apply.

It was for Mississippi courts to say whether the rule announced in *Providence* or the so-called majority rule imposed on state courts by *Love* was to be followed in the state of Mississippi. Deference to the state of Mississippi (not deference to federal court opinions, *see* footnote 11 of the opinion) by either discussing *Providence* or certifying the question to the Mississippi Supreme Court would have given "proper regard" to the perquisite of Mississippi courts to decide its own jurisprudence. As this court in *King v. United Commercial Travelers of America* stated, "[i]t is inadmissable that cases dependant upon that (state) law should be decided differently according to whether they are before federal or state courts," *id.* at U.S. 157, 158, S. Ct. 491. The fifth circuit decided this case differently than any court in the state of Mississippi would have; that is why federal jurisdiction was invoked by Reliance.

The fifth circuit cited the district court opinion in *Love* as authority for the "majority rule" (*see* opinion at page 9a, footnote 11, attached hereto as App. A) in apparent contradiction to *Salve Regina College v. Russell*, 499 U.S. 225, 236-239, 111 S. Ct. 1217, 1222-1225 (1991). The fifth circuit failed to acknowledge Mississippi case law as stated by the Mississippi Supreme Court on the strict meaning and reach of the term "named insured" in insurance policy

language,[8] and even failed to acknowledge *Providence* which was the only "exposition" of Mississippi state law on the subject of the reach of instrumentality exclusions, in violation of this court's decision in *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 518 (1972) (involved Georgia's intermediate court, a court of "statewide jurisdiction" as is the Mississippi Court of Appeals). On one hand, the court of appeals ignored "datum" of state law in the form of *Providence*, and, on the other hand, deferred to a district court's prediction of Mississippi law in contradiction to *Salve* at U.S. 238, S. Ct. 1224, "no form of appellate deference is acceptable."

The Mississippi Court of Appeals' opinion in *Providence*[9] was like the lower court decision in *Fidelity*

---

8. The term "named insured" enjoys a special and specific meaning under Mississippi law. Both the courts and the legislature clearly distinguish between the term "named insured" in insurance provisions and non-named insureds as defined within the terms of a policy or statute, *Aetna Casualty v. Barker*, 451 So. 2d 731, 733, 734 (1984). (Based on definition of "named insured" an extension of coverage to any automobile not owned by a "named insured" coverage was denied to an other insured (uninsured motorist)). *Harris v. McGee*, 537 So. 2d 646, 656 (1990) (Uninsured motorist coverage denied because of non-named insured status); *Rompy v. State Farm Mut. Auto Insurance Co.*, 278 So. 2d 428, 433 (1973) (A requirement that the named insured give notice as a condition precedent to recover not applicable to other insureds). *Stevens v. United States Fidelity and Guaranty Co.*, 345 So. 2d 1041, 1043 (1977) (Named insureds and other insureds are distinct classes of insureds).

9. At the time of the Mississippi Court of Appeals decision in *Providence*, the Mississippi Court of Appeals was an appellate court of statewide jurisdiction, an arm of the supreme court, and its opinions (in the absence of the Mississippi Supreme Court granting

(Cont'd)

Union Trust Company v. Field, 311 U.S. 169, 178, 61 S. Ct. 176, 178 (1940), "[j]udicial action [ ] and there is no other evidence of the state law in this relation." Also, like the lower court opinion in *Fidelity*, the Mississippi Court of Appeals' opinion involved "[t]he possibility that [ ] it will not be followed by the supreme court . . . or even by the court of chancery (court of appeals) itself," *id.* at U.S. 178, S. Ct. 179. Nevertheless, in the absence of more convincing evidence of state law, this Court held that federal courts must follow such a lower court formulation of state law when sitting in diversity, *id.* at 178.

In *King v. Travelers*, 333 U.S. 153, 68 S. Ct. 488 (1948), this Court held that even state trial courts whose decisions may be "ignored by other courts of common pleas" and whose decisions are "binding solely upon the parties before the court" and which are "in effect only another court of the state" were "properly attributed some weight," *id.* at U.S. 160, 161, S. Ct. 492, 493.

B. Failure To Certify The Question To The State Supreme Court.

Though the deference given state lower courts of appeals' decisions under the *Rules of Decision Act*,

---

(Cont'd)
and hearing a case on *writ of certiorari*) were final. At the time of the decision, the decisions of the Mississippi Court of Appeals were not officially published but were available to bench, bar and public through the internet from the Mississippi Supreme Court's official website. They were not to be cited as binding legal precedent and were not to be referred to by any other court. Southwick, *The Mississippi Court of Appeals: History, Procedures, and First Year's Jurisprudence* 65 Miss. L.J. 593, 623-628, Spring 1996; *See also Harris v. State*, 704 So. 2d 1286, 1288 (Miss. 1997).

28 U.S.C.A. § 1652, varies between the circuits, no circuit holds that a state lower court of appeals' decision directly on point may be totally disregarded or that a federal court may simply impose its perception of the "majority view" on diversity litigants without a thorough review of state law or without certifying the question to the state supreme court.

If the fifth circuit thought it inappropriate to rely on *Providence*, it should have, either on its own motion or at the suggestion of the petitioners, certified the question to the Mississippi Supreme Court under Mississippi Supreme Court Rule 20 rather than intrude on the prerogative of Mississippi courts to control Mississippi jurisprudence. As the seventh circuit case, *Lexington Insurance Company v. Rugg and Knopp, Inc.*, 165 F.3d 1087, 1093 (7th Cir. 1999), pointed out, if the federal court predictions are erroneous then:

> [U]ntil corrected by the state supreme court, [they] inevitably skew the decisions of [those] who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state's supreme court; they even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent.

Delores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1681 (1992). The Mississippi Supreme Court had granted certiorari in *Providence*, but the parties settled that case and it was dismissed before the supreme court could rule. Rule 20(A) of the Mississippi Supreme Court's rules allows the certification of questions to it.

C. This Court Should Resolve The Split Between The Circuits On The Deference To Be Given Intermediate Court Of Appeals' Decisions.

As to the rules followed by the various circuits, there is a split. The circuits seem roughly divided between a "must follow unless contradicted by higher court decision" rule, a "proper regard" rule, and an "it is proper to look" rule. Even within some circuits there is discrepancy on the amount of deference to be given state court of appeals decisions. An example of such discrepancy is found in *Sellers v. Allstate Insurance Company*, 82 F.3d 350, 409 (10th Cir. 1996),

> [w]e are not required to follow . . . *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 869 (10th Cir. 1993) . . . but see *Lowell States Mining Company v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1269 (10th Cir. 1989), *citing West v. AT&T*, 311 U.S. 223, 236-37, 61 S. Ct. 179, 183 (1940) "[f]ederal court must follow an intermediate state court decision". . . .

Some circuits hold that a state intermediate court of appeals decision must be followed unless it contradicts state statutes or other state supreme court decisions even if it is bad policy, wrong or contrary to the majority rule, *Assicurazioni v. Neal*, 160 F.3d 997, 1003 (4th Cir. 1998); *Lexington Insurance Company v. Rugg and Knopp*, 165 F.3d 1087, 1093 (7th Cir. 1999) ("[m]oreover, federal pronouncements on the content of state law inherently involve a significant intrusion on the prerogative of the state courts to control that development" at 1093); *Nelson v. Irvine*, 143 F.3d 119 (9th Cir. 1998) (must follow); *Veale v. Citibank*, 85 F.3d 577, 588 (11th Cir. 1996) (must follow

lower state appellate court decision which was contrary to prior "*Erie* guess" on the same issue); *Doyle v. Volkswagenwerk*, 81 F.3d 139, 142 (11th Cir. 1996) (question certified rather than not follow lower court opinion; the fifth circuit failed to comment on the Brannings' and Rives' suggestion that the question be certified to the state supreme court).

The second, third and sixth circuits seem to follow a mid position which requires giving the "fullest weight" and "proper regard" to lower state court opinions in the absence of contradictory state supreme court decisions. *First Investors Corporation v. Liberty Mutual Insurance*, 152 F.3d 162, 165 (2nd Cir. 1998); *2-J Corporation v. Tice Construction Company*, 126 F.3d 539, 541 (3rd Cir. 1997) ("In the absence of guidance from the state's highest court, we are to consider decisions of the state's intermediate appellate courts. . . ."); *Ziebart International Corp. v. CNA Insurance Companies*, 78 F.3d 245, 250, 251 (6th Cir. 1997) ("A datum for ascertaining state law **which is not to be disregarded** . . . .", at 250 (emphasis added)).

The fifth circuit follows an it is "proper to look" standard, *Shanks v. Allied Signal, Ins.*, 169 F.3d 988, 993, 994 (5th Cir. 1999); *Federal Deposit Ins. Corp. v. Abraham*, 137 F.3d 264, 268, 269 (5th Cir. 1998) (court of appeals panel is not required to follow intermediate state court of appeals' holding which is contrary to a prior fifth circuit panel holding); *Matheny v. Glenn Falls Insurance Company*, 152 F.3d 348, 354 (5th Cir. 1998) (Decisions of intermediate courts are not controlling).

The fifth circuit court of appeals follows a rule which allows it to choose its preference of law and impose its

perception of the majority view or the "best" reasoning upon the states rather than accord the state's courts and, ultimately, the state itself its due under the *Rules of Decisions Act* and its rights and prerogatives as a separate state under our federalist system. Simply adopting the majority view is no substitute for certification of the issue to the state supreme court, *Lexington Insurance* at 1093, "[a] federal court must be careful to avoid the temptation to impose upon a state what it or other jurisdictions might consider to be wise policy. That other jurisdictions favor a policy cannot weigh heavily in a federal court's determination in an unsettled area . . ." *Assicurazoni* at 1003.

II.

BY IGNORING AN INTERVENING FIFTH CIRCUIT DECISION PREDICTING STATE LAW ON THE REACH OF EXCLUSIONS IN THE FACE OF "SEPARATIONS OF INSUREDS" CLAUSES, THE FIFTH CIRCUIT OPINION, AGAIN, IGNORED STATE LAW ON A DETERMINATIVE ISSUE IN ITS OPINION.

The opinion totally ignores the "interpretative issue" in the fifth circuit's intervening opinion in *Centennial Insurance Company v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 380, 384-387 (5th Cir. 1998). Any doubt that the **two** owned aircraft exclusions, the "named insured" exclusion "in the policy" and the partial owned aircraft exclusion in rider 4(b), applied **separately** to the "named insured", Hinds, and the other insured, the Tomlinsons, so as to restrict the reach of the exclusion "in the policy" to the "named insured" under Mississippi law was erased by the fifth circuit's prediction of Mississippi law on the "interpretative issue before us", *Centennial* at 383. The interpretative issue was "[t]he effect

of an automobile insurance policy's severability of interests clause worded like the separation of insureds provision . . . containing the phrase 'against whom a claim or suit is brought' or very similar language on policy exclusions . . . ."[10] *Id.* at 386.

If the separation of insureds clause requires a separate analysis when a corporate party urges it upon the fifth circuit, why does it not compel the same separate analysis for the individual, personal injury litigant? The clause in the Reliance policy contains the same key language, "The insurance afforded applies separately to each insured against whom claim is made or suit is brought"[11]

If, as stated in the fifth circuit's decision in *Federal Deposit Insurance Corp.* at 268, *stare decisis* requires that one circuit court panel adhere "without exception" to a decision of a prior panel, why was the decision on the "interpretative issue" in *Centennial* ignored in this case? We were not told.

---

10. The fact that *Centennial* involved an "employee of insured" exclusion does not change the holding regarding the method of analysis under Mississippi law compelled as a result of a separation of insureds clause. *Centennial* was handed down after petitioners' initial brief to the fifth circuit, but its citation in their rebuttal briefs and *Petition for Rehearing* alerted the fifth circuit panel to the decision on the "interpretative issue." However, its decision on the "interpretive issue" was not discussed in the fifth circuit's opinion at all.

11. *See* Page Three of the policy, attached hereto as App. G.

III.

AN OPINION WHICH SIMPLY MAKES AN UNREASONED CONCLUSION ON A DETERMINATIVE ISSUE FALLS BELOW THE MINIMUM STANDARD DUE A CIVIL LITIGANT, EVEN A DIVERSITY LITIGANT, IN FEDERAL COURT SUCH THAT THIS COURT'S SUPERVISORY POWERS ARE CALLED ON, NOT ONLY TO CORRECT AN OBVIOUS WRONG AND SEE TO IT THAT FEDERAL COURTS PROVIDE MINIMAL DUE PROCESS IN ITS APPELLATE PROCEDURES, BUT ALSO TO MAKE UNIFORM THOSE STANDARDS DUE DIVERSITY LITIGANTS THROUGHOUT THE FEDERAL SYSTEM.

Without any explanation, rationalization or supporting analysis, the opinion simply concludes on page 7, with the force of logic attending the flip of a coin, that 4(b) is consistent with that court's interpretation that Clause 3 is a total exclusion of all coverage for damages arising from the ownership or use of planes owned by any insured. **Petitioners challenge any court, including this court, to provide a reasonable explanation of Clause 4(b)'s purpose if not to provide the applicable exclusion for aircraft owned by the airport manager.**

A clause which is clear and unambiguous (say Clause 3) when read in isolation but becomes unclear or uncertain when read with another clause (say Clause 4(b) or the declaration page[12] which identifies the only "named insured" as Hinds Community College) fails as an exclusion under

---

12. *See* the *Airport Liability Insurance Policy* declarations page attached as App. F.

Mississippi law. *Nationwide v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994). Even if there are two or more reasonable interpretations of a clause, the court **must** adopt the one that provides coverage, *Nationwide* at 662.

Any doubtful provision must be read against the insurer under the law of the state of Mississippi, *State Farm Mutual Auto. Ins. Co. v. Scitz*, 394 So. 2d 1371, 1372 (Miss. 1981). Exclusion clauses, particularly, must be interpreted favorably to the insured; they must be strictly restricted and given the more narrow application possible, *id.* at 1373. Any reasonable explanation consistent with non-exclusion must be accepted, even if there are reasonable interpretations favoring exclusions, *Caldwell v. Hartford Accident and Indemnity Company*, 248 Miss. 767, 160 So. 2d 209, 213 (Miss. 1964).[13]

It is so obvious that Clause 3's purpose in the *Special Airport Provisions* is to **restrict and bring into the *Special Airport Provisions*** the "named insured" owned aircraft exclusion "in the policy", and the purpose of 4(b) is to provide an exclusion for aircraft belonging to the airport manager. It just so happens that that exclusion, 4(b), is a partial exclusion, only excluding damages otherwise covered by insurance. At the least, it is a reasonable interpretation of the policy that, without 4(b), there would be no exclusion of any kind for aircraft owned by the insured airport manager.

---

13. *See* Page One of the *Comprehensive General Liability Insurance — Coverage Part* attached as App. G for the "named insured" owned aircraft exclusion and Page Four at App. G for the definition of "named insured."

At some point even personal injury claimants forced into the fifth circuit system by removal must be protected by this court's supervisory powers as set out in United States Supreme Court Rule 10(a):

> [i]t is inadmissable that cases dependant on that (state) law should be decided according to whether they are before a federal or state court. This is particularly true where accidental factors such as diversity of citizenship and the amount in controversy enable one of the parties to chose whether the case is tried in federal or state court.

King at 333 U.S. 153, 157, 68 S. Ct. 488, 491 (1948).

CONCLUSION

It is obvious that Reliance had read *Providence* and knew that its chances in state court were slim indeed. No Mississippi court would have failed to see that 4(b) had no purpose other than to provide an exclusion not otherwise provided, albeit a partial (covered by other insurance) one. No Mississippi court would have construed "aircraft owned by the named insured" to include aircraft owned by any insured as the fifth circuit opinion did. Only when seeing both, does harmony of the exclusions and consistency of the insurance policy appear so as to make a sensible, whole contract, *Brown v. Hartford Ins. Co.*, 606 So. 2d 122, 126 (Miss. 1997).

Even if the state courts had bought both the "named insured means any insured" argument and the "4(b) is consistent and has no purpose argument", it still would have been faced with the court of appeals decision in *Providence.*

The outcome would have been different in the Mississippi system! Having its choice of forum, Reliance simply decided early to put all its eggs in the federal system's basket.

To allow the fifth circuit decision in this case to stand would truly be perpetuating "two divergent or conflicting systems of law," *West* at U.S. 236 S. Ct. 183. The *Rules of Decision Act* **"commands"** that federal courts give proper regard to state law, "The ideal aimed at by the Act is, of course, uniformity of decision within each state." *King* at 157. This Court should not sanction such a dual system but must grant certiorari in this case in order to prevent injustice to these litigants and to prevent the perpetuation of injustice to other diversity litigants.

Respectfully submitted,

EDWARD A. WILLIAMSON
Counsel of Record
THE WILLIAMSON LAW FIRM
ATTORNEYS AT LAW
Attorneys for Petitioners
509A Church Avenue
Philadelphia, Mississippi 39350
(601) 656-5634